# Legal Letters by Andrew Agatston –The Legal List 2/22/13

## Forensic Interviewers as Expert Witnesses, Part I

Case:

State v. Kromah

South Carolina Supreme Court

Case No. 2009-140328

(decided January 23, 2013)

Facts: The 3-year-old victim in this case, referred to as "Child," was the stepson of the Defendant. The Defendant married the child's biological father in March 2005. In August 2005, the subject incident occurred and the Defendant was indicted for infliction of great bodily injury to, and unlawful neglect of, a child.

The child was taken to the emergency room at approximately 2:25 a.m. by the Defendant. The child had a cut on his scrotum, and his right testicle was hanging outside of the scrotum and was bloody. The Defendant told a nurse that the scrotum had just "busted open or tore open." Defendant stated that she noticed the child's scrotum enlarged when she was giving him a bath and applied pressure using a towel, then noticed bleeding.

The child was examined by numerous specialists, including a pediatric physician, a pediatric urologist, and the medical director of the violent intervention and prevention program in the Department of Pediatrics at the Medical University of South Carolina, among other physicians. Collectively, they testified about the child's injuries, including the wound looking "like a scalpel incision" to the scrotum, and that the wound had to be caused by a sharp instrument such as a "scalpel, razor blade, steak knife, something very sharp."

As to the child's other wounds, the testimony by these physicians included that the wounds on the child's lips and face looked to be caused by blunt force trauma, including possible blows to the face with a hand or fist.

An investigator testified. He stated that he took Defendant's statement, and Defendant acknowledged that she was the only person at home with the child when he was injured.

The Defendant testified at trial, reiterating her story to the healthcare providers. She denied cutting the child, and stated she had no explanation as to what caused the child's testicle to be hanging outside of his scrotum.

The child did not testify. DSS had taken him into emergency custody, but prior to trial he was returned to his father. His father sent the child to live with the child's grandmother in Liberia, which is where the Defendant and her husband were born.

The Defendant was convicted of inflicting great bodily injury upon a child, and unlawful neglect of a child.

She filed a motion for new trial or a reduced sentence, and at the hearing Defendant testified that she lied at trial. She testified that she injured the child accidentally when she was "agitated" with him because the child did not want to take a bath, and "handled him roughly," and accidentally cut him with her long, acrylic fingernails that had sharp edges.

The Defendant also presented the child as a witness at the hearing. The boy testified that the Defendant hurt him when he was bathing, but did not see anything in her hand. He testified that he bit his own lip.

The trial court denied the motion for new trial or a reduced sentence. The Defendant appealed, arguing that the trial court erred by permitting two of the State's witnesses to testify about actions that they took based on hearsay statements made by the child, who would have been incompetent to testify at trial. The South Carolina Court of Appeals affirmed the conviction, and

the state Supreme Court accepted review of the case. For purposes of today's Legal Letter, we will address the S.C. Supreme Court's analysis of the Defendant's claim that the forensic interviewer should not have been allowed to testify about actions she took as a result of hearsay statements made by the 3-year-old child who would have been incompetent to testify.

Result: Defendant's convictions affirmed, *but* . . .

Discussion: Yes, the Defendant's conviction stood because any error that the trial court made in allowing the forensic interviewer's testimony was *harmless beyond a reasonable doubt* because of the overwhelming evidence of guilt that was properly admitted.

Laying the groundwork for the appeal: The Defendant's argument on appeal was as follows: (1) Since the trial court determined that the child was not a competent witness, (2) and the forensic interviewer relied on the (incompetent) child's statements made to her in the forensic interview to form her assessment, then (3) her testimony offered was unreliable and inadmissible because she relied on her conversation with the child, who would have been incompetent to testify.

In this case, the trial court qualified the forensic interviewer, with no defense objection, as an expert. As we will see, the S.C. Supreme Court was critical of this decision, but that was not its basis for concluding that the forensic interviewer's testimony was improper.

Instead, the S.C. Supreme Court found the forensic interviewer's testimony improper because she testified about her conclusion that there was a "compelling finding" of physical abuse. For example:

*Q:[Y]our finding was compelling for child abuse or physical abuse?"*

*A: For child physical abuse, yes.*

*Q: And without saying what was said during the interview or anything else, did you pass the information along to law enforcement officers . . . and other law enforcement agencies?*

*A: Yes, yes I did.*

The S.C. Supreme Court's Concerns: Admittedly, I have read, re-read, and read again this opinion. And I plan to read it more because I'm motivated at some point to respond to the Court's expressed and implied criticisms of forensic interviewing.

But for purposes of today's Legal Letter, the Court raised one substantive concern and one theoretical concern.

The substantive concern was that the interviewer should not have been able to testify that she made a "compelling finding" of abuse. The legal rationale for this opinion does not plow any new ground -- we've seen it many times before in appellate cases everywhere. In this case it was seen as testimony that impermissibly bolstered the credibility of the child. It invaded the "exclusive province" of the jurors, who make all final determinations of a witness's credibility. The S.C. Supreme Court found that the forensic interviewer's "compelling finding" statement was the equivalent of a statement that the forensic interviewer believed the child, and/or believed the child was being truthful.

All of these rationales are valid concerns, and are repeated in appellate cases everywhere, regardless of the type of witnesses who testify. So an important piece of pretrial preparation for any witness, forensic interviewers included, is to determine prior to trial the *scope and reach* of the testimony that will be elicited. This will depend on a number of factors, some unique to your state's jurisdiction, and some general to all jurisdictions. An example of the latter that is related to all jurisdictions is that there is a "no vouching-no bolstering" rule that we just discussed.

The scope and reach of forensic interview testimony can be extensive, and it takes legal research in your jurisdiction to determine what your state's trial courts will allow a forensic interviewer to say.

For forensic interviewers in South Carolina, they will be very interested in today's case that set down some clear guidelines.

Each state has rules of evidence related to expert testimony. South Carolina Rule of Evidence 702 states: *"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."*

In today's case, the S.C. Supreme Court went "all in" on categorizing the RATAC forensic interview protocol as a "style of interviewing" that "is not scientific."

In a footnote, the Court wrote: *"The title of 'forensic interviewer' is a misnomer. The use of the word forensic indicates that the interviewer deduces evidence suitable for use in court. It also implies that the evidence is deduced as the result of the application of some scientific methodology. The RATAC style of interviewing . . . merely represents the objectives and topics of discussion between the interviewer and the child. Somehow RATAC is supposed to convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption."*

The Court in its opinion was aware of the ancient twin concerns of interview bias and suggestibility, but unfortunately did not address the numerous other settled factors commonly applied by trial courts to determine the admissibility of expert testimony: the various protocols have been published and ***peer-reviewed***; the interviewing techniques have been exhaustively ***tested*** and continue to be; forensic interviewers are ***specially trained***; there are ***standards*** for interviewing; forensic interviewing is ***widely accepted*** in the various fields that address child abuse issues, and more.

Instead, the Court concluded that *"In considering the ongoing issues developing from their use at trial, we state today that we can envision no circumstance where their qualification as an expert at trial would be appropriate."*

This conclusion is disputed by numerous reported appellate decisions elsewhere. One of these decisions will be discussed next week. Ultimately, we know there are numerous models for forensic interviewing that have been peer-reviewed, exhaustively studied and researched, which

make them amendable to the rigors of expert work in trial. Trial courts are the "gatekeepers" of expert testimony, but they must be given the full amount of foundational information necessary for them to conclude that forensic interviewers may reasonably serve as experts.

Best regards.

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